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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 33

NORTHWEST AIRLINES, INC., PETITIONER,

vs.

STATE OF MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED JUNE 8, 1953.

CERTIORARI GRANTED OCTOBER 12, 1953.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

NORTHWEST AIRLINES, INC., PETITIONER,

vs.

THE STATE OF MINNESOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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[fol. 1]

IN DISTRICT COURT OF RAMSEY COUNTY

THE STATE OF MINNESOTA, Plaintiff,

vs.

NORTHWEST AIRLINES, INC., a Corporation, Defendant

CITATION

The State of Minnesota to the Defendant Above Named:

Whereas, The County Auditor of said County has, on the 16th Day of July, A. D. 1940, filed with the Clerk of said Court a copy of the duly revised list of delinquent taxes upon personal property, for the year 1939, according to the provisions of the statutes in such cases made and provided.

And Whereas, The sum of $22,498.56 including penalty provided by law, appears upon said copy of the revised list as the taxes duly assessed against you, for personal prop-
[fol. 2] erty, for the year 1939, and that the same are due and delinquent, you are hereby cited to be and appear before the District Court aforesaid, at the next general term of said Court, commencing on the 7th day of October, A. D. 1940, at 10 o'clock in the forenoon of that day, at the Court House in the City of St. Paul, in said County, then and there to show cause, if any there be, why you should not pay such taxes and penalty, and if you shall fail to pay said taxes, penalty and all the accrued costs thereon to the Sheriff of said Ramsey County, before the first day of said term of Court, or upon said first day of said term fail to show sufficient cause for said non-payment of said taxes, and all costs as aforesaid, judgment will be entered against you for said amount of said taxes, together with costs as aforesaid and disbursements.

Witness, the Honorable Hugo O. Hanft, Judge of said Court, and the seal of said Court, at St. Paul, in said County this 25th day of July, 1940.

N. C. Robinson, Clerk, by C. E. Ralph, Deputy Clerk.

Make remittances to T. J. Gibbons, Sheriff.

[fol. 3] IN DISTRICT COURT OF RAMSEY COUNTY

ANSWER

Comes now Northwest Airlines, Inc., defendant above named, and for its answer to the citation hitherto issued in the above entitled proceedings respectfully shows to the Court that:

I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

The citation of Thomas J. Gibbons, Sheriff of Ramsey County, Minnesota, dated May 15, 1940, and bearing number 6550, was served upon the defendant on May 16, 1940.

III

The sum demanded is Twenty-three Thousand Six Hundred Twenty-three and 74/100 Dollars ($23,623.74) as taxes and penalty for the year 1939 upon personal property of the defendant claimed to be located at the Municipal Airport [fol. 4] in the City of Saint Paul, County of Ramsey and State of Minnesota.

IV

Defendant is informed and verily believes said assessment was based in part at least upon the full value of defendant's entire fleet of aircraft, even though not physically present in Ramsey County on May 1, 1939, upon the theory that all of said aircraft are taxable in full at Saint Paul as their home port.

V

Defendant is engaged in the business of carrying mail, passengers and freight for hire in interstate commerce, and operates aircraft on regular schedules between Chicago, Illinois, and Seattle, Washington, and Portland, Oregon, via Milwaukee and Madison, Wisconsin, Rochester, Saint Paul and Minneapolis, Minnesota, Fargo and Bismarck-Mandan, North Dakota, Miles City, Billings, Butte, Helena and Missoula, Montana, and Spokane, Wenatchee and Yakima, Washington. Defendant also operates regular scheduled flights between Fargo, North Dakota, and Winnipeg,

Manitoba. On May 1, 1939, the defendant was making no scheduled stops at Saint Paul. Since June 1, 1940, the de-
[fol. 5] fendant has been operating aircraft on regular schedules between Minneapolis and Duluth, Minnesota.

VI

Defendant maintains an overhaul base at Saint Paul, Minnesota, and operates maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington; at which points important service and maintenance work and minor and emergency repairs are made. At these points aircraft are kept for originating flights or for changing ships on through flights. The defendant also maintains ground crews at various points along its lines, and leases or owns hangers at various points.

VII

All of defendant's said aircraft are integral parts of its said interstate operations; and are necessary instrumentalities thereof; all of said aircraft are continuously engaged in flying from state to state in the course of defendant's said operations, except for brief stops at airports in the course of scheduled flights and except for occasional lay-ups for repairs or overhauling. The said aircraft have no fixed situs, and their location is constantly shifting from
[fol. 6] one county to another and from one state to another. On May 1, 1939, there were present during part or all of the day in Ramsey County only one Electra, one Zephyr and one Stinson airplane belonging to the defendant.

VIII

For the year 1939 the defendant paid taxes on said aircraft, or on a proportionate valuation thereof, in the States of Illinois, Minnesota, North Dakota, Montana, Oregon and Washington.

IX

Defendant alleges that the levy and assessment of a personal property tax against said aircraft, or any part thereof, would be in violation of the following sections of the Constitution of the State of Minnesota:

1. Article 1, Section 2, in respect of the provision thereof that "no member of this state shall be * * * deprived

of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers";

2. Article 1, Section 7, in respect of the provision thereof that "no person shall be deprived of life, liberty, or property without due process of law";

[fol. 7] 3. Article 4, Section 34, in respect of the provision thereof that all general laws "shall be uniform in their operation throughout the state"; and

4. Article 9, Section 1, in respect of the provision thereof that "taxes shall be uniform upon the same class of subjects."

X

Defendant further alleges that the levy and assessment of personal property taxes against said aircraft, or any of the same, are in violation of Article I, Section 8, of the Constitution of the United States in respect of the provision that "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states," and also in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States in respect of the provision that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 8] XI

Defendant alleges that the City of Saint Paul, the County of Ramsey and the State of Minnesota are each and all without jurisdiction to levy a personal property tax upon said aircraft, or any part of the same, and that the levy of said tax upon said aircraft or any part of the same constitutes an unlawful burden upon the interstate commerce conducted by the defendant.

XII

Defendant further alleges that even if said aircraft were taxable in part by said County of Ramsey as of May 1, 1939, the valuation placed upon said aircraft and the proportion-

ate basis upon which they were taxed were wholly excessive and grossly arbitrary.

Wherefore, defendant prays that it have judgment that it owes plaintiff nothing upon the assessment above set forth, and that defendant have its costs and disbursements herein.

Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for defendant, E-1006 First Natl. Bk. Bldg., Saint Paul, Minnesota.

Duly sworn to by E. I. Whyatt. Jurat omitted in printing.

[fol. 9] IN DISTRICT COURT OF RAMSEY COUNTY

AMENDED STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto and their respective counsel that the following facts may be taken as true for purposes of the above entitled case:

[fol. 10] I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

II

The defendant is engaged in the business of carrying persons, property and mail for hire in interstate commerce and operates aircraft on regular schedules between the City of Chicago in the State of Illinois and the City of Seattle in the State of Washington and the City of Portland in the State of Oregon via the Cities of Milwaukee and Madison in the State of Wisconsin; the Cities of Rochester, St. Paul and Minneapolis in the State of Minnesota; the Cities of Fargo and Bismarck-Mandan in the State of North Dakota; the Cities of Miles City, Billings, Butte, Helena and Missoula in the State of Montana and the Cities of Spokane, Wenatchee and Yakima in the State of Washington. The defendant also operates regular scheduled flights between the City of Fargo, North Dakota and the City of Winnipeg in the Province of Manitoba, connecting with its transcon-

tinental flights. The defendant also operates regular scheduled flights between the City of Minneapolis in the State [fol. 11] of Minnesota and the City of Chicago in the State of Illinois. On May 1, 1939, the defendant was making no scheduled stops in the City of St. Paul.

III

On May 1, 1939, the defendant maintained its airplane and engine overhaul base at St. Paul, Minnesota, at which principal repairs to its engines and planes were made; and also maintained a hangar at said airport.

IV

On May 1, 1939, the defendant maintained and operated maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington, at which points service and maintenance work were performed. These service and maintenance stations each included a hangar, a crew of licensed mechanics, each in charge of a foreman, a complete set of maintenance tools, such as drill presses, hoists, fuel supply equipment, welding equipment, trucks, tractors, battery carts and cleaning equipment and a complete stock room of parts and supplies. All work on defendant's aircraft, with the exception of rebuilding and overhauling the same, was performed at these maintenance stations.
[fol. 12] At all its stops, including its maintenance bases, the defendant did on May 1, 1939, maintain a radio operator and a station manager, except that there was no radio operator or dispatcher at St. Paul. At a number of its stops the defendant also maintained baggage handlers, ticket sellers and information clerks, dispatchers and other employees.

At all its stops the defendant either owned or leased buildings for housing whatever operations it conducted at that particular point.

The defendant owned hangars at Chicago, Illinois, and Fargo, North Dakota. The defendant leased hangars at Minneapolis and St. Paul, Minnesota, Billings and Miles City, Montana, Spokane and Seattle, Washington. At Milwaukee and Madison, Wisconsin, Rochester and Duluth, Minnesota, Bismarck, North Dakota, Butte, Missoula and Helena, Montana, and Yakima and Wenatchee, Washington,

the defendant owned or leased offices and other space at the respective airports for its activities.

The defendant's flight crews, including pilots, copilots and stewardesses, had their bases, that is to say they began and ended their runs for the defendant, at the following points:

Chicago-Billings run—Minneapolis, Minnesota.

Fargo-Winnipeg run—Fargo, North Daktoa. (No stewardesses on this run.)

[fol. 13] Billings-Seattle run—Seattle, Washington.

Spokane-Portland run—Portland, Oregon and Spokane, Washington.

On May 1, 1939, none of the defendant's flight crews had their base at St. Paul.

V

The defendant's routes from Chicago to Seattle and Portland and from Fargo to Winnipeg were fixed and followed along their entire length a series of radio range courses which were operated day and night by the Civil Aeronautics Authority, these ranges being placed at regular intervals along the routes and being so situated as to mark a continuous course of travel. Along defendant's entire route there were also emergency landing fields at regular intervals which were maintained by the Civil Aeronautics Authority. Whenever the occasion requires due to weather conditions, it may be necessary to abandon the regular route of travel and follow another course for short intervals.

VI

The airplanes owned and operated by defendant were constantly changing from place to place along defendant's routes. All of said aircraft were continuously engaged in [fol. 14] flying from state to state in the course of defendant's operations, except for brief stops at the airports in the course of scheduled flights and except for occasional layups for repairs or overhauling. The location of said aircraft was constantly shifting from one county to another and from one state to another.

VII

All of defendant's airplanes were in Minnesota from time to time during the year 1939 carrying passengers,

property and the mails and for the purpose of periodical overhauling. On May 1, 1939, there were present in the State of Minnesota for at least part of the day the following listed airplanes belonging to the defendant and constituting a part of its entire fleet, the time of arrival, time of departure, and total time present at the respective airports being as follows:

[fol. 15]

No. of Ship	Time In	Time Out	Total Time at Port
MINNEAPOLIS			
NC 17387 Zephyr 14H	12:03 A. M.	6:55 A. M.	
	3:36 P. M.	....	15 hrs. 76 min.
NC 18994 " "	....	12:30 A. M.	
	8:35 P. M.	8:55 P. M.	50 min.
NC 14907 Lockheed 10A	6:35 A. M.	3:55 P. M.	9 hrs. 20 min.
NC 17392 Zephyr 14H	8:15 A. M.	6:00 P. M.	9 hrs. 45 min.
NC 14263 Lockheed 10A	8:19 A. M.	8:39 A. M.	20 min.
NC 21713 Douglas DC-3	....	11:21 A. M.	11 hrs. 21 min.
NC 21711 " "	10:10 A. M.	1:30 P. M.	
	8:45 P. M.	9:14 P. M.	3 hrs. 49 min.
NC 21712 " "	10:55 A. M.	2:38 P. M.	
	8:25 P. M.	....	7 hrs. 18 min.
NC 14170 Stinson Reliant	....	....	24 hrs.
NC 17385 Zephyr 14H	....	....	24 hrs.
NC 14900 Lockhead 10A	....	....	24 hrs.
NC 14261 " "	....	....	24 hrs.
NC 14244 " "	....	....	24 hrs.
ROCHESTER			
NC 21711 Douglas DC-3	9:20 A. M.	9:35 A. M.	
	2:10 P. M.	2:15 P. M.	20 min.
NC 18994 Zephyr 14H	9:32 P. M.	9:43 P. M.	10 min.
ST. PAUL			
NC 14262 Lockheed 10A	....	....	24 hrs.
NC 17386 Zephyr 14H	....	....	24 hrs.

VIII

On May 1, 1939, the defendant's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and its flights were all made pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board. Its airplanes were all registered with the Authority with St. Paul as their home port.

[fol. 16]

IX

The defendant filed its return for 1939 and included therein airplanes of its fleet of the total true and full value of $77,000.00. Thereafter the Assessor of said Ramsey County duly made an additional assessment of omitted property consisting of planes then owned by the defendant as of May 1, 1939, at a true and full value of $630,000.00; except that

it is agreed that the actual true and full value of said omitted property on said last mentioned date was the sum of $511,500.00;.and except further that the defendant contends that such property is taxable in Ramsey County, Minnesota, only to the extent of 13% of the true and full value of the defendant's entire fleet of airplanes which was of the agreed value of $588,500.00 as more fully appears from Paragraph XII hereof. That said additional assessment was duly entered by the County Auditor on the assessment and tax books for the year 1939 but was not paid; that thereafter the list of all personal property taxes remaining delinquent on the first day of April, 1940, which included said additional assessment, was duly certified to and filed with the Clerk of the above named district court; that thereafter, said additional assessment still remaining delinquent, all proceedings required by law were duly taken, including the issuance of a citation to the above named defendant; and [fol. 17] that in response thereto said defendant filed its answer.

X

Pursuant to Section 2018 Mason's Minnesota Statutes, 1927, on the 18th day of March, 1940, the Commissioner of Taxation of the State of Minnesota duly made an order determining that the proper place of listing and assessment for taxation as of May 1, 1939, of certain of the defendant's airplanes which had been actually present in Hennepin County on May 1, 1939, was in Ramsey County.

XI

The defendant paid personal property taxes upon its airplane fleet in some proportion of its full value in the States of Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington for the year 1939.

XII

The total length of the routes over which defendant was running scheduled flights on May 1, 1939, was 2,466 miles. The total length of the defendant's routes over which scheduled flights were maintained in the State of Minnesota on May 1, 1939, was 320.2 miles. The scheduled route mileage [fol. 18] in Minnesota on May 1, 1939, was 14% of the total scheduled route mileage. The scheduled plane mileage of defendant over all its routes on May 1, 1939, was 14,414

miles and the scheduled plane miles in Minnesota on May 1, 1939, was 2,348.4 miles. The proportion of the scheduled plane miles in Minnesota on May 1, 1939, to scheduled plane miles everywhere was 16%.

James F. Lynch and Andrew R. Bratter, Attorneys for Plaintiff. Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Defendant.

* * * * * * *

[fol. 19] In District Court of Ramsey County

Findings of Fact, Conclusions of Law and Order for Judgment—October 4, 1941

The above-entitled matter came on regularly to be tried before the undersigned, one of the Judges of the above-named Court, on the 8th day of July, 1941, upon the agreement of counsel for the parties hereto to submit the case upon an agreed stipulation of facts. The State of Minnesota was represented by James F. Lynch, County Attorney of said Ramsey County, and Andrew R. Bratter, Assistant [fol. 20] County Attorney; and the defendant appeared by its attorneys Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell.

The action involves a tax levied and assessed by the County Auditor of said Ramsey County for the year 1939 upon the fleet of airplanes operated by the defendant.

The parties having filed an agreed stipulation of facts, the matter having been argued orally before the Court and briefs having been filed, the Court makes the following

Findings of Fact

I

The defendant is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business at Saint Paul Municipal Airport, Saint Paul, Minnesota.

II

The defendant is engaged in the business of carrying persons, property and mail for hire in interstate commerce and operates aircraft on regular schedules between the City of Chicago in the State of Illinois and the City of

Seattle in the State of Washington and the City of Port-
[fol. 21] land in the State of Oregon via the Cities of Milwaukee and Madison in the State of Wisconsin; the Cities of Rochester, St. Paul and Minneapolis in the State of Minnesota; the Cities of Fargo and Bismarck-Mandan in the State of North Dakota; the Cities of Miles City, Billings, Butte, Helena and Missoula in the State of Montana and the Cities of Spokane, Wenatchee and Yakima in the State of Washington. The defendant also operates regular scheduled flights between the City of Fargo, North Dakota and the City of Winnipeg in the province of Manitoba, connecting with its transcontinental flights. The defendant also operates regular scheduled flights between the City of Minneapolis in the State of Minnesota and the City of Chicago in the State of Illinois. On May 1, 1939, the defendant was making no scheduled stops in the City of St. Paul.

III

On May 1, 1939, the defendant maintained its airplane and engine overhaul base at St. Paul, Minnesota, at which principal repairs to its engines and planes were made; and also maintained a hangar at said airport.

[fol. 22] IV

On May 1, 1939, the defendant maintained and operated maintenance bases at Chicago, Illinois, Minneapolis, Minnesota, Fargo, North Dakota, Billings, Montana, and Spokane and Seattle, Washington, at which points it maintained a crew of mechanics and tools and equipment for service and maintenance work. All the work on the defendant's aircraft, with the exception of rebuilding and overhauling the same, was performed at these maintenance stations.

At all its stops, including its maintenance bases, the defendant did on May 1, 1939, maintain a radio operator and a station manager, except that there was no radio operator or dispatcher at St. Paul. At a number of its stops the defendant also maintained baggage handlers, ticket sellers and information clerks, dispatchers and other employees.

At all its stops the defendant either owned or leased buildings for housing whatever operations it conducted at that particular point.

The defendant owned or leased hangars and office space at the several ports at which its planes landed.

The defendant's flight crews, including pilots, co-pilots and stewardesses, had their bases, that is to say they began and ended their runs for the defendant, at the following points:

[fol. 23] Chicago-Billings run—Minneapolis, Minnesota.

Fargo-Winnipeg run—Fargo, North Dakota. (No stewardesses on this run)

Billings-Seattle run—Seattle, Washington.

Spokane-Portland run—Portland, Oregon and Spokane, Washington.

On May 1, 1939, none of the defendant's flight crews had their base at St. Paul.

V

The defendant's routes from Chicago to Seattle and Portland and from Fargo to Winnipeg were fixed and followed along their entire length a series of radio range courses which were operated day and night by the Civil Aeronautics Authority, these ranges being placed at regular intervals along the routes and being so situated as to mark a continuous course of travel. Along defendant's entire route there were also emergency landing fields at regular intervals which were maintained by the Civil Aeronautics Authority. Whenever the occasion requires due to weather conditions, it may be necessary to abandon the regular route of travel and follow another course for short intervals.

[fol. 24] VI

The airplanes owned and operated by defendant were constantly changing from place to place along defendant's routes. All of said aircraft were continuously engaged in flying from state to state in the course of defendant's operations, except for brief stops at the airports in the course of scheduled flights and except for occasional layups for repairs or overhauling. The location of said aircraft was constantly shifting from one county to another and from one state to another.

VII

All of defendant's airplanes were in Minnesota from time to time during the year 1939 carrying passengers, property and the mails and for the purpose of periodical overhauling. On May 1, 1939, there were present in the State of Minnesota for at least part of the day the following

listed airplanes belonging to the defendant and constituting a part of its entire fleet, the time of arrival, time of departure, and total time present at the respective airports being as follows:

[fol. 25]

No. of Ship	Time In	Time Out	Total Time at Port
MINNEAPOLIS			
NC 17387 Zephyr 14H	12:03 A. M.	6:55 A. M.	
	3:36 P. M.	....	15 hrs. 76 min.
NC 18994 " "	....	12:30 A. M.	
	8:35 P. M.	8:55 P. M.	50 min.
NC 14907 Lockheed 10A	6:35 A. M.	3:55 P. M.	9 hrs. 20 min.
NC 17392 Zephyr 14H	8:15 A. M.	6:00 P. M.	9 hrs. 45 min.
NC 14263 Lockheed 10A	8:19 A. M.	8:39 A. M.	20 min.
NC 21713 Douglas DC-3	....	11:21 A. M.	11 hrs. 21 min.
NC 21711 " "	10:10 A. M.	1:30 P. M.	
	8:45 P. M.	9:14 P. M.	3 hrs. 49 min.
NC 21712 " "	10:55 A. M.	2:38 P. M.	
	8:25 P. M.	....	7 hrs. 18 min.
NC 14170 Stinson Reliant	....	....	24 hrs.
NC 17385 Zephyr 14H	....	....	24 hrs.
NC 14900 Lockhead 10A	....	....	24 hrs.
NC 14261 " "	....	....	24 hrs.
NC 14244 " "	....	....	24 hrs.
ROCHESTER			
NC 21711 Douglas DC-3	9:20 A. M.	9:35 A. M.	20 min.
	2:10 P. M.	2:15 P. M.	
NC 18994 Zephyr 14H	9:32 P. M.	9:42 P. M.	10 min.
ST. PAUL			
NC 14262 Lockheed 10A	....	....	24 hrs.
NC 17386 Zephyr 14H	....	....	24 hrs.

VIII

On May 1, 1939, the defendant's flight operations were subject to the jurisdiction of the United States Civil Aeronautics Authority and its flights were all made pursuant to certificates of public convenience and necessity issued by the Civil Aeronautics Board. Its airplanes were all registered with the Authority with St. Paul as their home port.

[fol. 26]

IX

The defendant filed its return for the year 1939 and included therein airplanes of its fleet of the total true and full value of $77,000.00. That thereafter an additional assessment of omitted property consisting of the remainder of airplanes then owned by the defendant as of May 1, 1939, was added to the tax rolls at a true and full value of $630,000; it was agreed, however, that the actual true and full value of said omitted property on said last-mentioned date was the sum of $511,500.00. That said additional assessment was duly entered by the County Auditor on the assess-

ment and tax books for the year 1939 but was not paid; that thereafter the list of all personal property taxes remaining delinquent on the first day of April, 1940, which included said additional assessment, was duly certified to and filed with the Clerk of the above-named district court; that thereafter, said additional assessment still remaining delinquent, all proceedings required by law were duly taken, including the issuance of a citation to the above-named defendant; and that in response thereto said defendant filed its answer. That the assessed value of said omitted property, figured on the basis of 33⅓% of the true and full value, was $170,500.00; that the tax rate for the year 1939 was 99.2 mills on the dollar; that the correct amount of taxes [fol. 27] levied and assessed against this defendant, based upon said valuations and said rate, is $16,913.60.

X

Pursuant to Section 2018 Mason's Minnesota Statutes, 1927, on the 18th day of March, 1940, the Commissioner of Taxation of the State of Minnesota duly made an order determining that the proper place of listing and assessment for taxation as of May 1, 1939, of certain of the defendant's airplanes which had been actually present in Hennepin County on May 1, 1939, was in Ramsey County.

XI

The defendant paid personal property taxes upon its airplane fleet in some proportion of its full value in the States of Illinois, Wisconsin, North Dakota, Montana, Oregon and Washington for the year 1939.

XII

The total length of the routes over which defendant was running scheduled flights on May 1, 1939, was 2,466 miles. The total length of the defendant's routes over which scheduled flights were maintained in the State of Minnesota on [fol. 28] May 1, 1939, was 320.2 miles. The scheduled route mileage in Minnesota on May 1, 1939, was 14% of the total scheduled route mileage. The scheduled plane mileage of defendant over all its routes on May 1, 1939, was 14,414 miles and the scheduled plane miles in Minnesota on May 1, 1939, were 2,348.4 miles. The proportion of the

scheduled plane miles in Minnesota on May 1, 1939, to scheduled plane miles everywhere was 16%.

From the foregoing Findings of Facts, the Court makes the following

Conclusions of Law

I

That the domicil of the defendant herein on May 1, 1939, was in said Ramsey County.

II

That the proper place for the listing and assessment of its property which was taxable in the State of Minnesota, was in said Ramsey County.

III

That the property of the defendant which is in question in this case and which was added to the assessment and tax [fol. 29] rolls as omitted property by the County Auditor of said Ramsey County had a situs for taxation in the State of Minnesota and not elsewhere.

IV

That said property was duly and regularly in all respects assessed by the proper authorities of said Ramsey County.

V

That the true and full value of said property on May 1, 1939, was the sum of $511,500.00; that the assessed value thereof was the sum of $170,500.00; that the rate of taxation for the year 1939 on such property was 99.2 mills upon the assessed value thereof.

VI

That the plaintiff herein is entitled to judgment against the defendant herein for such taxes in the sum of $16,913.60 together with the penalty thereon which is 8% of the said tax or the sum of $1,353.08; being a total amount of tax and penalty of $18,266.68.

[fol. 30] Let Judgment Be Entered Accordingly.
Dated St. Paul, Minnesota, October 4, 1941.
Kenneth G. Brill, Judge of the District Court.

The entry of Judgment is hereby stayed for 40 days.
Kenneth G. Brill, Judge of the District Court.

In District Court of Ramsey County

Judgment—January 2, 1942

The above entitled matter having been regularly tried before the above named court, the Court having made and filed its findings of fact, conclusions of law and order for judgment; and the parties having stipulated that judgment may be entered without costs to either party.

Now Therefore,

It Is Adjudged that the true and full value of the defendant's property, to-wit: its fleet of airplanes described in the findings of fact filed herein, as of May 1, 1939, was the sum of $511,500.00; that the assessed value thereof was the sum of $170,500.00; that the rate of taxation for the year 1939 on such property was 99.2 mills upon the assessed [fol. 31] value thereof and that the amount of taxes due to the plaintiff from the defendant for the year 1939 is the sum of $16,913.60, together with the penalty thereon at the rate of 8% or the sum of $1,353.08 and that the total amount of the judgment hereby found in favor of the plaintiff and against the defendant is the sum of $18,266.68.

Dated at St. Paul, Minnesota, this 2nd day of January, 1942.

By the Court.

J. J. Fitzgerald, Clerk of the District Court, by A. B. White, Deputy.

Approved as to Form: 1-5-42. Kenneth G. Brill, Judge of the District Court.

[fol. 32] Stipulation waiving bond omitted in printing.

[fol. 33] IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL—January 5, 1942

To the above-named plaintiff and to James F. Lynch and Andrew R. Bratter, its attorneys, and to J. J. Fitzgerald, Clerk of the above-named Court:

You Will Please Take Notice, that the above-named defendant appeals to the Supreme Court of the State of Minnesota from that certain judgment of the above-named Court filed herein on January 5, 1942.

Dated January 5, 1942.

Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Defendant, E-1006 First Natl. Bk. Bldg., Saint Paul, Minnesota.

[fol. 34] [File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

Pirsig, J.

Concur: Streissguth, J.

Dissent: Loring, J., Gallagher, C. J., J. J. Olson, J.

33176

STATE OF MINNESOTA, Respondent,

vs.

NORTHWEST AIRLINES, INC., Appellant

SYLLABUS—Filed December 18, 1942

1. A tax by a state without jurisdiction to impose it is unconstitutional as a violation of due process.

2. The decisions of the Supreme Court of the United States will be followed in the interpretation of the meaning of due process under the federal constitution. Although our state constitution contains a similar provision, it was not intended to be more restrictive than that of the federal constitution.

Defendant filed its tax return for the year 1939 in which it included a portion of its airplanes at the full value of [fol. 37] $77,000. This valuation was based on planes in the state on May 1, 1939. Later, an additional assessment was made by the county auditor in which he included the remaining airplanes owned by the defendant at the full value of $511,500.

From the foregoing facts the lower court concluded that all of the planes "had a situs for taxation in the state of Minnesota and not elsewhere" and accordingly directed judgment to be entered for the taxes upon all of the planes in the sum of $16,913.60, together with penalty thereon, making a total of $18,266.68.

The question before us is whether this state may impose a tax upon all of defendant's planes. The right to do so is attacked on the grounds that it is a violation of the due process clauses of the state and federal constitutions and that it is an interference with interstate commerce.

Taking up first the claim that the tax is a violation of due process, the general rule is that a tax by a state which has no jurisdiction to impose it violates the constitutional prohibition against taking property without due process of law. For present purposes it is unnecessary to consider separately the due process clauses of the state and federal constitutions. If under this clause of the federal constitution this state may impose a tax upon all of the planes owned by defendant, it may also do so under the state constitution. The state provision was not intended to be more restrictive than that of the federal constitution. State v. Weyerhauser, 72 Minn. 519, 75 N. W. 718; W. J. Armstrong Co. v. N. Y. C. & H. R. R. Co., 129 Minn. 104, 151 N. W. 917. In In re Estate of Taylor, 175 Minn. 310, 315, 219 N. W. 153, 221 N. W. 64, 65, this court said:

"It is our aim to follow the decisions of the Supreme Court of the United States, since we are construing a provision of the federal constitution, although our own state constitution contains a similar provision."

If, therefore, the tax may be imposed under the due process clause of the Fourteenth Amendment, it may also be imposed under our constitution.

[fol. 38] The airplane has raised many unique legal questions in other fields. We do not, however, consider it of such a nature that it must be placed in a new and inde-

pendent category so far as taxation is concerned. It is but personal property used for the transportation of persons and goods. Its distinction lies in that it leaves the ground and travels through the air. But this is not of significance here. The sovereign power and jurisdiction of a state is not limited to the ground. An airplane in the air over the territory of a state is within the state and subject to its sovereign power. As the Supreme Judicial Court of Massachusetts has said in Smith v. New England Aircraft Co. Inc., 270 Mass. 511, 521, 170 N. E. 385, 389, 69 A. L. R. 300, 308:

"It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protection." See also People v. Katz, 249 N. Y. S. 719, 140 Misc. 46.

The question we have, then, is the broader one of when and under what conditions the state of the owner's domicile loses jurisdiction to tax tangible personal property moving about from state to state? May the state of domicile tax the whole thereof?

Two classes of cases have particular bearing on this question. The first deals with ships upon the high seas. It has been held in those cases that where a ship sails from its home port and into the port of a foreign state and stays there but temporarily for the purpose of loading or unloading it cannot be taxed by the latter state. Hays v. Pacific Mail S. S. Co., 58 U. S. (How.) 596; Morgan v. Parham, 83 U. S. (Wall.) 471; Southern Pacific Co. v. Kentucky, 222 U. S. 63. The rule has been applied to ships plying navigable streams. St. Louis v. The Ferry Company, 78 U. S. (Wall.) 423; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

In some of these cases the court relied upon the maxim *Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam.* Another reason given was that the [fol. 39] property had not "become incorporated with other personal property of the state" seeking to impose the tax. Hays v. Pacific Mail S. S. Co., 58 U. S. (How.) 596; Morgan v. Parham, 83 U. S. (Wall.) 471; and see Old Dominion S. S. Co. v. Virginia, 198 U. S. 299. The more basic reason was given in Southern Pacific Co. v. Kentucky, 222 U. S. 63, 68: "The ancient maxim which assigns to tangibles, as

well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence."

If the ship has obtained an actual situs in a state other than that of the home port, that state might validly subject the ship to the ordinary property taxes of that state. Old Dominion S. S. Co. v. Virginia, 198 U. S. 299. In that event, it has been said that the situs of the domicile yields to the actual situs and resulting dominion of another government.

The second class of cases relating to the question here involved deals with the taxation of rolling stock of railroad companies. For the purpose of determining whether such property has acquired a situs in a state foreign to that of the domicile of the company, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, introduced a new principle. In that case Pennsylvania imposed what was in substance a property tax upon the cars of an Illinois corporation within the borders of Pennsylvania. A certain proportion of the company's cars was constantly and continuously present there. For that reason, the right of Pennsylvania to impose the tax was sustained, notwithstanding the fact that individual cars making up the average in the state were constantly changing and were there but temporarily. The court looked not at the individual cars but at the average, and that average was permanently located in Pennsylvania. See also Marye v. B. & O. R. Co. 127 U. S. 117. The Pullman Car case, 141 U. S. 18, was followed in, among other decisions, American R. T. Co. v. Hall, 174 U. S. 70, and Union R. T. Co. v. Lynch, 177 U. S. 149. The principle [fol. 40] of the case has its limitations. The foreign state may not tax more than the average number of cars present, even though all the cars of the company might at some time during the tax period be actually, but temporarily, present within the state. A tax on all the cars is invalid. Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158. It is necessary also that an average number of cars appear to be permanently present. This court has held that where the railroad cars of a foreign corporation are but temporarily here the right to tax does not exist. State v. Union Tank Line Co. 94 Minn. 320, 102 N. W. 721.

Defendant contends that the principle of the Pullman Car decision, 141 U. S. 18, is applicable in this case, and that other states through which its planes are routed are

entitled to tax the average number of planes constantly present in those states even though any individual plane may be there but temporarily. The state, on the contrary, takes the position that no situs has been acquired in other states, and, by analogy to the ship cases, this state, being the domicile of defendant, may tax them all. Neither the stipulation nor the findings are as clear as one could wish on whether such an average number of planes was so constantly and permanently in any one state as to acquire a situs there. But we shall not pursue the question, for under the view we adopt it is not a material factor. We concede that the principle of the Pullman Car case is as applicable to planes as it is to railroad cars and that the findings lead to the conclusion that some proportion of defendant's planes acquired a situs in other states and to that extent may be taxed there.

That leaves the further question whether the acquisition of a situs in a foreign state removes the jurisdiction of the state of the owner's domicile to tax. The cases so far discussed do not, except by incidental comment, bear upon that problem. They deal only with the right of the foreign state to tax. So far as a specific item of tangible personal property is concerned, the question was decided in Union [fol. 41] Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. It was there held that if such property has acquired a tax situs in another state it cannot be taxed in the state of its owner's domicile. The principle so laid down has since been uniformly followed. Frick v. Pennsylvania, 268 U. S. 473, 489, 45 S. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92, 93, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386; Sancho v. Humacao Shipping Corp. (1 Cir.) 108 F. (2d) 157.

It is the claim of defendant that the Transit Company case, 199 U. S. 194, established with equal force that the result is the same when the situs is acquired in the foreign state by the application of the doctrine of the Pullman Car case, 141 U. S. 18. Hence, since some proportion of defendant's planes may, as conceded, be taxed in other states, it is claimed that this state has lost its power to tax to a corresponding degree.

A careful examination of the Transit Company case will disclose that it does not go to the length so claimed for it. It appears that there Kentucky sought to impose what was treated as a property tax upon all the railroad cars owned

by the transit company, which was incorporated in Kentucky. The headquarters for its cars were located at Milwaukee, Wisconsin, at which point they were rented to shippers who used them for the carrying of freight in the United States, Canada, and Mexico. The court held that Kentucky had no jurisdiction to tax all the cars of the company. The record in the case reveals further that some of the cars were in fact constantly coming into and going out of Kentucky, and that the state trial court had found that a definite average number of cars was in the state during the year for which the taxes were imposed. But it is also evident that there were larger numbers of the company's cars which were never within the state at any time during the tax period. The opinion of the court makes it clear that it was this last fact which the court deemed [fol. 42] controlling. The court states the question before it to be (199 U. S. 201) "whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, *permanently* located in other States, and employed there in the prosecution of its business." It states further (P. 204) that "property which is *wholly* and *exclusively* within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation," and that such property "does not and cannot receive protection under its laws. * * * [P. 206] it is taxable in the State where it is *permanently* located and employed and where it receives its *entire* protection." (All italics supplied).

In defining the basis upon which the court denied the right to tax, it said (199 U. S. 202):

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an

extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

It is plain that the court in denying the right of Kentucky to tax was speaking about those cars which were permanently in other states and did not reach Kentucky at all. The facts did not raise the question, and there is nothing to indicate that the court intended to hold, that cars going from Kentucky and from time to time returning to it could not be taxed by that state because they had contributed to an average which had acquired a situs in another state. The only question before the court was the validity of the tax on all of the company's cars, some of which were perma- [fol. 43] netnly in other states. It is noteworthy that the court cites and states the holding of the Pullman Car case without suggesting that it had any direct application to the facts before it. We conclude, therefore, that the case does not sustain the claim of defendant that this state has lost the right to tax all its planes because an average of them had obtained a situs in other states.

The only other cases requiring consideration upon this point are New York ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, and Johnson Oil Ref. Co. v. Oklahoma, 290 U. S. 158. In the New York Central case, the state of domicile of a railroad company was permitted to tax all the cars of the company despite the fact that an average number of cars was constantly outside the state. The court distinguished the Pullman Car case, 141 U. S. 18, on the ground that it appeared in that case that (202 U. S. 597) "The same cars were continuously receiving and protection of the State and, therefore, it was just that the State should tax a proportion of them." The court expressly reserved the question whether there was "any necessary parallelism between liability elsewhere and immunity at home." That reservation in itself indicates that the court did not consider the question settled by its previous decision in the Transit Company case, 199 U. S. 194.

In the Johnson Oil Ref. case, 290 U. S. 158, the owner of the cars was an Illinois corporation with its principal place of business at Chicago. Oklahoma sought to tax all the cars of the corporation on the ground that they were from time to time during the year within the state. The court held that the power of Oklahoma to tax the cars was limited

to the average number of cars in the state and that a tax on all was invalid. Broad language was used by court in its opinion, and, as ably shown by the dissenting opinion of Mr. Justice Loring, it is reasonably susceptible of more than one interpretation. We believe that it should be read [fol. 44] in the light of the facts before the court. It was dealing with a situation where the only basis of taxation appearing was the average number of cars present in the state. The decision and the opinion are not inconsistent with permitting a state to tax additional or all the cars if additional and constitutionally recognized grounds for the tax exist. If we find, therefore, that an adequate basis existed in this state for taxing all the planes, the Johnson case does not deny the right to tax merely because other states also have the power to do so.

We are left, therefore, without any controlling authority to guide us, and in its absence we must resort to the basic constitutional principles upon which the right or jurisdiction of a state to tax depends. In so doing, we cannot rest upon any logical application of some legalistic concept or *situs*. When we say that property has a *situs* within a state for the purposes of taxation we mean only that it is proper and consistent with due process that that state may impose the tax. There is no constitutional justification for giving the concept a controlling power of its own.

For a time, under the decisions of the United States Supreme Court, this was not true. An attempt was made to use the concept of *situs* with respect to both tangible and intangible property for the purpose of limiting the power to tax to a single state. See Farmers L. & T. Co. v. Minnesota, 280 U. S. 204; First Nat. Bank v. Maine, 284 U. S. 312. In the latter case, Mr. Chief Justice Hughes was a member of the majority of the court which adopted this view. See also his concurrence in the dissenting opinions in Wisconsin v. J. C. Penney Co., 311 U. S. 435, and Curry v. McCanless, 307 U. S. 357. Much of his opinion in Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, can be explained on this basis. On this ground, Blackstone v. Miller, 188 U. S. 189, was overruled. Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 209. By this means the court sought to bring about what it thought to be a [fol. 45] desirable policy—the avoidance of double taxation. See cases cited *supra*; also Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. But in more recent decisions

this attempt to read into the due process clause any such limitation has been definitely rejected as an improper judicial attempt to compel the application of views as to wise legislative policy through the process of constitutional interpretation. The possibility of taxation of the same property by more than one state is no longer a constitutional objection. Recently, First Nat. Bank v. Maine, 284 U. S. 312, where the contrary view had been adopted was overruled, and the case of Blackstone v. Miller, 188 U. S. 189, restored to good favor. State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008.

We look, therefore, not to whether another state is entitled to tax, but rather to whether the power to do so exists in this state. Property may have a *situs*, if we wish to use that term, in more than one state, depending upon whether the basic considerations are present which give a state the right to tax under the requirements of due process. These considerations have repeatedly been stated to be first, the sovereign power of the state over the person or property, and, second, the rendering in return of a substantial benefit or protection to the person or property taxed. Thus, in the recent leading case of Curry v. McCanless, 307 U. S. 357, 364, the court said:

"The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so with- [fol. 46] out constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax."

Again, in Wisconsin v. J. C. Penney Co., 311 U. S. 435, the court said:

"A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * * [The] test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

See also quotation, *supra*, from Transit Company case, 199 U. S. 202, See Southern Pacific Co. v. Kentucky, 222 U. S. 63.

We need not consider whether all the cases can be logically reconciled with the principles thus laid down. It is sufficient that, particularly in the recent cases, they have been insisted upon and made the criteria for the constitutional basis of the power to tax. It is our duty to follow them.

Applying these principles in this case, we have no difficulty in sustaining the tax of this state upon all the planes owned by defendant. The power of this state over defendant and the property taxed was present. Defendant was incorporated here. Its principal place of business is located in this state, and all the planes at some time or another come within its borders. The benefits conferred upon defendant by the government and laws of this state in relation to all of defendant's planes is equally clear. The policies and decisions made by defendant in connection with the operations of its planes were made here and under the protection and benefit of the laws of this state. The manner and extent of their operations were determined and directed from this state. Particularly significant is the fact that when planes were in need of major repairs and overhauling [fol. 47] the necessary repairing and overhauling were done here. These benefits did not cease the moment the planes crossed the border into another state. They continued and contributed to the successful operation of the planes throughout the course and scope of their operations.

There is, therefore, no violation of due process in the taxation by this state of all the planes. There was a fair basis in the power of this state over defendant and its planes and in the benefits conferred with respect to this property upon which the tax may rest. We hold, therefore, that the tax here in question on all the planes was a valid one.

Our decision does not rest upon any application of the discredited maxim *"Mobilia sequuntur personam; immobilia situm. Mobilia non habent sequelam,"* nor upon the bare fact that defendant was incorporated here. A more substantial reason for the tax exists. The state is giving a real and substantial return for the tax it seeks to impose. Neither do we question the principle that a specific item of personal property, permanently located in another state, cannot be taxed here. That is not the case before us. We hold only that there is a fair basis upon which this state may impose the tax in question and that any right of another state to impose a similar tax upon some portion of the planes does not adversely affect that basis. It may well be that defendant will be required to pay taxes in other states upon some portion of its planes. If so, it is because, under the principles stated, a fair basis for the tax exists in those states also. In any event, on the facts as they appear before us and under the principles already stated, states other than this one would not appear entitled to tax to any greater extent than the average number of planes within its borders during the tax period. As stated in the concurring opinion of Mr. Justice Frankfurter in State Tax Comm. v. Aldrich, 316 U. S. 174, 183, 62 S. Ct. 1008, 1013:

"Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the Nation. It does so [fol. 48] because the transaction in its entirety may receive the benefits of more than one government."

Whether or not it is economically wise or fair to impose the tax herein sustained we are not entitled to consider under the principles already stated. That question is more properly addressed to the legislature, whose prerogative and responsibility it is to enter into such considerations. The power to make a good law of necessity carries with it the power to make an unwise one. "A tax within the lawful power of a state" may not "be judicially stricken down

under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses." Magnano Co. v. Hamilton, 292 U. S. 40, 45 (citing cases).

Defendant's second objection to the tax is equally without foundation. That the planes were engaged largely in interstate commerce does not deprive this state of the right to impose the tax. Property engaged in the transportation of interstate commerce may be subjected by a state to the usual nondiscriminatory property taxes if jurisdiction to tax otherwise exists. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. See also Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, and cases therein cited.

The provisions of the statutes relating to taxation of personal property are sufficiently broad to include all the planes of defendant. All nonexempt personal property owned by a resident is taxed. See Minn. St. 1941, § 272.01 (Mason St. 1927, § 1974), and *Id.* § 272.03, subd. 3 (§ 1979). The statutes do not in express terms exclude such property when located outside the state, and the language of § 272.01 (§ 1974) makes plain enough that the intention was to include it.

The judgment of the lower court is affirmed.

Maynard E. Pirsig.

[fol. 49] Loring, Justice (dissenting):

I find my views at variance with the conclusion arrived at by the majority. I agree with them that, insofar as tangible personal property is concerned, the doctrine of *mobilia sequuntur* is outworn and discarded. See Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194. It follows, of course, as they say, that the place of incorporation of the taxpayer does not control as to such property. This leaves their opinion resting upon the facts that all the planes of defendant at regular times come within the protection of this state, that major repairs are made here, and that the company's offices are here. Does an opinion so grounded harmonize with the principles of due process as developed and announced by the United States Supreme Court?

I think the majority are misled by failing to distinguish between what that court has said in cases involving in-

tangibles and what it has held in those involving tangible property. If the broad expressions used with reference to intangible property such as those used in State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, cited by the majority, should be applied to tangible property, which was not there under consideration, we should find that the doctrine of *mobilia sequuntur,* which the majority agree is now discarded as to tangible property, would be restored in great measure and made applicable to tangible property as well as to intangibles. It certainly applies only to tangible property when that property has acquired no *situs* whatever for taxation elsewhere. "The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 206.

The Supreme Court has drawn a clear distinction between tangible personal property and intangible property [fol. 50] in the application of due process. In Curry v. McCanless, 307 U. S. 357, 365, involving intangibles, Mr. Justice Stone (now Chief Justice), speaking for the court, after discussing the *situs* of tangibles in relation to the taxing power, said:

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. [Citing cases.] Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities."

Therefore, the broad expressions with reference to the power and jurisdiction to tax contained in cases relative to intangibles, such as State Tax Comm. v. Aldrich, 316 U. S. 174, 62 S. Ct. 1008, 86 L. ed. 911 (Advance Sheets), and Curry v. McCanless, 307 U. S. 357, are not applicable to due

process as applied to the taxation of tangible property. In the "intangible" cases, the protection of the rights of transfer of the evidence of ownership may result, as in State Tax Comm. v. Aldrich, *supra*, in what appears to be double or multiple taxation.

It appears to me that it would be very unfortunate to extend to tangible property throries which have been applied to intangibles only. The Supreme Court has not done so. Should the habitual use and flight of airplanes over the various jurisdictions be held to subject all the taxpayer's planes—not only a proper proportionate share of them —to double or multiple taxation on their full value, it would not only be unjust but would create a situation so burdensome to the airlines as materially to handicap their development and extension, so vital to the national interest. It would likewise be unfortunate for those states imposing [fol. 51] the tax on the full value and would doubtless in the end result in congressional authorization of the incorporation of airlines under national law and control of taxation. See Mr. Justice Jackson's dissent, concurred in by Mr. Justice Roberts, in State Tax Comm. v. Aldrich, 316 U. S. 174, 185, 202, *supra*.

The problem of taxation of airplanes engaged in scheduled aerial transportation is one of first impression. Airplanes span the continent in a few hours, passing over many jurisdictions in the course of a day's flight. A plane may be in any one state but one or two hours out of the 24, or even only part of an hour. In its very nature, aerial transport is largely interstate. If the operations of an airline were confined to the protection of any single state and to the benefits and opportunities conferred by the laws of that state, such a line would be of little importance in the vast field of air transport. If defendant's operations were confined to the state of Minnesota, doubtless two or three planes would answer its needs. Its ownership of the large number of planes here sought to be taxed is necessitated by its operations in interstate commerce, where it habitually and regularly subjects itself to the protection of other jurisdictions and receives the benefits afforded by the laws of other states, to whose sovereignty it become subject, except as it falls within the control of the federal government. In that regard there is no distinction between the benefit and protection afforded by Minnesota and that afforded by

Illinois, Wisconsin, North Dakota, Montana, Idaho, or Washington. If the protection and benefit extended by state sovereignty to these aircraft justifies a tax on the full value of all of them because they are continually traversing the air across this state and because at times they all come within its boundaries, then every state traversed by the air route may tax the whole number that flies over such state on the full value. If the tax imposed by Minnesota on the full value of all the planes used by defendant is sustained, it becomes not only a tax imposed for the protection afforded [fol. 52] by Minnesota but a tax burdening the entire service of these planes throughout their route. In reality it assesses their owner as if its protection covered the planes throughout their route. Thus, it assesses for protection it does not furnish and which it has no power to furnish.

"The power of taxation, indispensible to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in protection of his person and property." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202.

I am in full accord with the view that the law as applied to steamships where the sovereignty of the flag follows the ship throughout the voyage does not apply to airplanes flying scheduled flights over land. Logically, planes are more like fleets of railroad cars being operated in interstate traffic.

Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, was a case where Pawnee county, Oklahoma, under a state statute, sought to tax the entire fleet of the Johnson company's tank cars, which were used mainly in transporting oil from its refinery in Oklahoma to other states. The Johnson company was an Illinois corporation, but its refinery, trackage, and repair facilities were in Oklahoma. Like defendant's planes, the cars were in almost continuous movement and the major share of the time were beyond the boundaries of the state, though they were all marked to be returned to the refinery in Oklahoma, where was located the control and supervision of the cars. Thus we have a situation much like that presented to us in the case at bar except that the Johnson company was incorporated in Illinois instead of Oklahoma, a matter which the United States Supreme Court and the majority here seem to

regard as immaterial insofar as tangible property is concerned. A stronger feature for the company in the case at bar is that its planes are beyond the state boundaries on regular uniform schedules and routes defined by the Civil Aeronautics Authority. Oklahoma's right to tax all the [fol. 53] cars was challenged as a violation of the due process clause of the Fourteenth Amendment. Relating to the jurisdiction to tax, the court in that case, speaking through Mr. Chief Justice Hughes, said (290 U. S. 162):

..."*The basis of the jurisdiction is the habitual employment of the property within the State.* By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. *When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States.*" (Italics supplied.)

True, the Chief Justice, speaking for the court, also said (290 U. S. 161):

"Appellant had its domicile in Illinois, and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.'"

True enough, assuming that the property had acquired a *situs* in the domiciliary state, but the statement was obviously not intended to apply if it had not. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, *supra*. But the situation in the Johnson Oil Co. case, 290 U. S. 158, as here, was that the tangible personal property had acquired *situs* for proportionate taxation elsewhere. In the case at bar, the flights on regular daily schedules throughout the year were not mere (290 U. S. 161) "occasional excursions" into other jurisdictions, but the property (290 U. S. 162) "habitually used and employed" on such flights within other states acquired a *situs* for proportionate taxation in those states.

As illustrated by the Johnson Oil Co. case, the *situs* in the other states for tax purposes may be proportionate only. It need not be such a *situs* as would confer jurisdic-

tion to tax the full value of all cars which come into the state even when they come in habitual use. It may be a jurisdiction to tax a fair proportion as determined by aver- [fol. 54] age presence or other fair method of apportioning the tax. It might, in the case of aircraft, be based upon miles or hours flown in the state in proportion to those flown elsewhere.

I cannot find that the Johnson Oil Co. case has been overruled or qualified insofar as tangible property is concerned, nor do I think it is in conflict with the previous case of People ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, 597, where New York's franchise tax, measured by property, was sustained as applied to all the cars of the railroad company. There the court said, speaking of the problem before it:

"In the present case, however, it does not appear that *any specific cars* or *any average of cars* was so continuously in any other State as to be taxable there. *The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads.*" (Italics supplied.)

Whatever the actual facts as to car routings may have been, the court in that case viewed the record as showing only "random excursions of casually chosen cars" outside the state. The case was decided on that assumption. That situation is not present in the case at bar. Here we have air transport planes continuously and habitually used on scheduled flights over fixed routes, much more extensive than through Minnesota, over at least six other states, where they have acquired a situs for proportionate taxation by virtue of the protection and benefit of those jurisdictions, which subjects them to taxation in those states. American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 82; Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158, *supra;* Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149.

While neither state nor national constitution contains a specific prohibition against double or multiple taxation as such, obviously the imposition of such a tax may under certain circumstances offend some provision of the fundamental law. Reed v. Bjornson, 191 Minn. 254, 253 N. W.

102. It is to be avoided if reasonably possible. Bemis Bro. [fol. 55] Bag Co. v. Wallace, 197 Minn. 216, 228, 266 N. W. 690. "Protection against * * * unjust and oppressive taxation is matter of the greatest moment." Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 212. Here, quite obviously, it is not only oppressive but burdens interstate commerce. It would not do so if it were confined to Minnesota's proportionate share.

There is no question but that Minnesota may tax its proportionate share of the airplanes here involved; but, as said in Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 162, the jurisdiction "to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other States." It is the power of other states to tax due to habitual use and employment of the planes within their boundaries which affects the *situs* of the planes and the right of Minnesota to tax more than its proportionate share. As said in Farmers L. & T. Co. v. Minnesota, 280 U. S. 204, 211, "the right of one State to tax may depend somewhat upon the *power* of another to do so." Certainly that rule has not been changed as to tangibles as witness the Johnson Oil Co. case, *supra*. It is the existence of the power to tax, not the exercise of it, that affects the *situs*. Sancho v. Humacao Shipping Corp. (1 Cir.) 108 F. (2d) 157, 160, though in the case at bar all states on defendant's scheduled routes except Idaho have exercised it.

Whether a proportionate tax should be imposed on the theory of miles or hours flown within the state as compared to the total mileage or hours flown, or upon the basis of average number of planes present in the state under normal operating conditions, having in mind that during most of the time, as was the case with the cars in the Johnson Oil Co. case, most of the planes are outside the state, is probably not a problem for this court to determine. It should not, however, distinguish this case from the Johnson Oil Co. case. That the planes come into the state every day or nearly every day does not distinguish it. They are out of [fol. 56] the state on flights over other jurisdictions a large proportion of the time. The only difference from the Johnson Oil Co. case is that planes move faster and more frequently than cars. The principle is the same. What this court should say is that the tax may only be imposed by Minnesota upon its proportionate share figured on some

reasonable basis, which, primarily, the taxing authorities should first determine.

To summarize:

1. We have a case of a specific tax on tangible personal property, *viz.*, aircraft.

2. Such property is not subject to the rules applied to intangibles.

3. By habitual use and employment on fixed schedules in flights over other states, the aircraft have acquired a *situs* for proportionnate taxation in those states.

4. That *situs* must be taken into consideration in determining Minnesota's constitutional power to tax, regardless of the domicile or principal place of business of the taxpayer.

5. Minnesota may tax only proportionate part of the value of the property arrived at on some reasonable basis primarily to be fixed by the taxing authorities.

I think the judgment should be reversed.

Loring, J.

GALLAGHER, Chief Justice (dissenting):

I concur in the dissent of Mr. Justice Loring.

Gallagher, C. J.

JULIUS J. OLSON, Justice (dissenting):

I concur in the views of Mr. Justice Loring.

Julius J. Olson, J.

[fol. 57] STREISSGUTH, Justice (concurring specially).

The dissenting opinion of Mr. Justice Loring is based principally upon his interpretation of Johnson Oil Co. v. Oklahoma ex rel. Mitchell, 290 U. S. 158. He insists that that case is indistinguishable from the case at bar, notwithstanding that there the state, seeking to tax an entire fleet of floating tank cars, was not the state of the corporate owner's domicile. To quote from his dissent:

"Thus we have a situation much like that presented to us in the case at bar except that the Johnson company was incorporated in Illinois instead of Oklahoma, a matter which the United States Supreme Court and the majority here

seem to regard as immaterial insofar as tangible property is concerned."

But an examination of the opinion of Mr. Chief Justice Hughes establishes the contrary. To quote (290 U. S. 161):

"Appellant had its domicile in Illinois and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. 'The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts.'"

In support of this statement, the Chief Justice cites New York ex rel. N. Y. C. & H. R. R. Co. v. Miller, 202 U. S. 584, 26 S. Ct. 714, 50 L. ed. 1155; Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 S. Ct. 13, 56 L. ed. 96. These cited cases and not the Johnson Oil Co. case are controlling here, as clearly pointed out by Mr. Justice Pirsig in his opinion. Granted that domicile of the corporate owner standing alone will not vest in the domiciliary state the power to tax an entire fleet of airplanes, yet the additional facts that the corporation's principal place of business is in the state, that all of its airplanes come within its borders during the tax year on scheduled trips and for repairs, and that the manner and extent of their operation is determined and directed from the state, supply the additional elements necessary to invest the state with power to tax such planes.
[fol. 58] I not only fully but emphatically agree with Mr. Justice Loring that "to subject all the taxpayer's planes * * * to double or multiple taxation * * * would not only be unjust but would create a situation so burdensome to the airlines as materially to handicap their development and extension, so vital to the national interest."

As a court we cannot, however, concern ourselves with policy, a purely legislative question. Our only inquiry is power. It is an uncontroverted doctrine that courts will not consider the justice, wisdom, expediency, propriety, necessity, or policy of tax laws or other legislation. That cardinal principle is the basis of the circumspect avoidance by the judiciary of encroachment upon the exclusive domain of the legislature, a coequal branch of the government. 11 Am. Jur., Constitutional Law, pp. 802-3-4, 900, §§ 136-138, 198; 1 Cooley, Const. Limitations (8 ed.) 346; State v. Fairmont Creamery Co., 162 Minn. 146, 202 N. W. 714, 42 A. L. R. 548; Champion v. Ames (lottery case) 188 U. S. 321, 363,

23 S. Ct. 321, 47 L. ed. 492, 504; McCrary v. United States, 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78, 1 Ann. Cas. 561.

As recently as November 9, 1942, in the case of Wickard v. Filburn, — U. S. —, Mr. Justice Jackson reiterated this rule in the following language:

"The validity of an Act of Congress is not to be refused application by the courts as arbitrary and capricious and forbidden by the Due Process Clause merely because it is deemed in a particular case to work on inequitable result."

Mr. Justice Pirsig has convincingly demonstrated that this state's power to tax defendant's entire fleet of airplanes exists so long as no part of it is permanently located in another state. I therefore concur in his conclusion, though reluctantly and not without suggesting that, for reasons so forcibly pointed out by Mr. Justice Loring, remedial legis-
[fol. 59] lation to correct any possible unfairness to defendant and other companies similarly situated be enacted without delay lest congress assert its undisputed power and authorize "the incorporation of airlines under national law and control of taxation."

Streissguth, J.

[fol. 60] IN SUPREME COURT OF MINNESOTA

In the Matter of the Proceedings to Enforce Payment of Delinquent Personal Property Taxes for the Year 1939

33176

STATE OF MINNESOTA, Respondent,

vs.

NORTHWEST AIRLINES, INC., a Corporation, Appellant

JUDGMENT—December 31, 1942

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

[fol. 61] IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION AS TO RECORD—March 17, 1943

Upon the proposed petition of the appellant to the Supreme Court of the United States for writ of certiorari to the Supreme Court of Minnesota, it is stipulated that the record to be certified to the Supreme Court of the United States by the Clerk of the Supreme Court of Minnesota shall consist of:

1. The record filed by appellant of the proceedings in the District Court of Ramsey County, Minnesota, excepting and deleting therefrom the "Amended Stipulation of Facts" found on pages nine to seventeen, inclusive, of said record.

2. Amended Stipulation of Facts appended to respondent's supplemental brief and found on pages three to twelve, inclusive, thereof.

3. The opinions (majority and minority) of the Supreme Court of Minnesota.

4. The judgment of the Supreme Court of Minnesota.

5. This stipulation.

Dated March 17, 1943.

M. J. Doherty, W. E. Rumble, Attorneys for Appellant. James F. Lynch, Andrew R. Bratter, Attorneys for Respondent.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

NORTHWEST AIRLINES, INC., Petitioner,

vs.

THE STATE OF MINNESOTA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 5th, 1943.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 31st day of March, 1943.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 10, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.